

*R. H. Anderson*

240

## TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 141 >

KUNHARDT & CO., INC., APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

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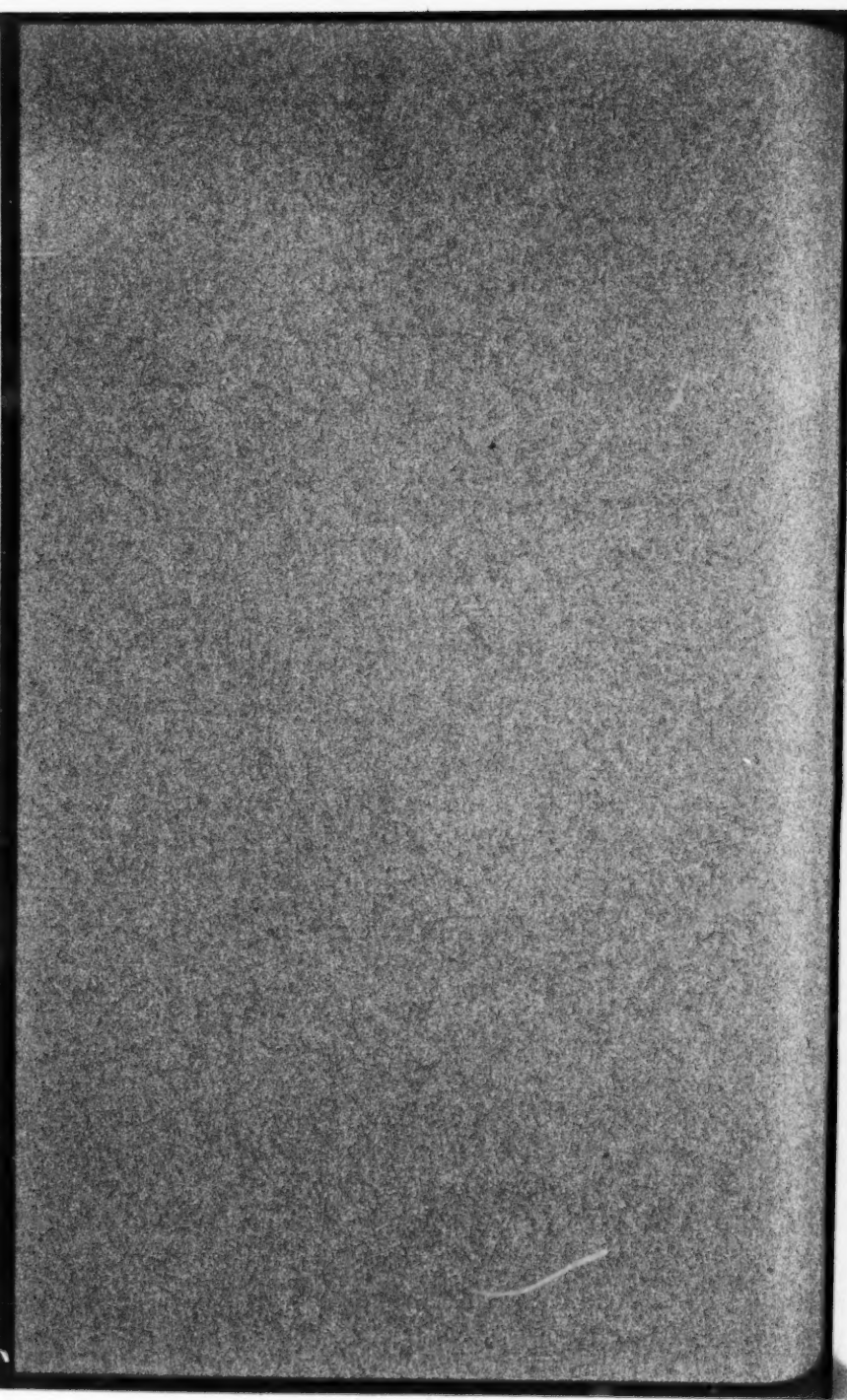
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FILED AUGUST 6, 1925

(39,794)

*No. 141*  
*Do. 141*

*Pl. Gould it not held to be  
because he wanted it*



(29,794)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 484

KUNHARDT & CO., INC., APPELLANT,

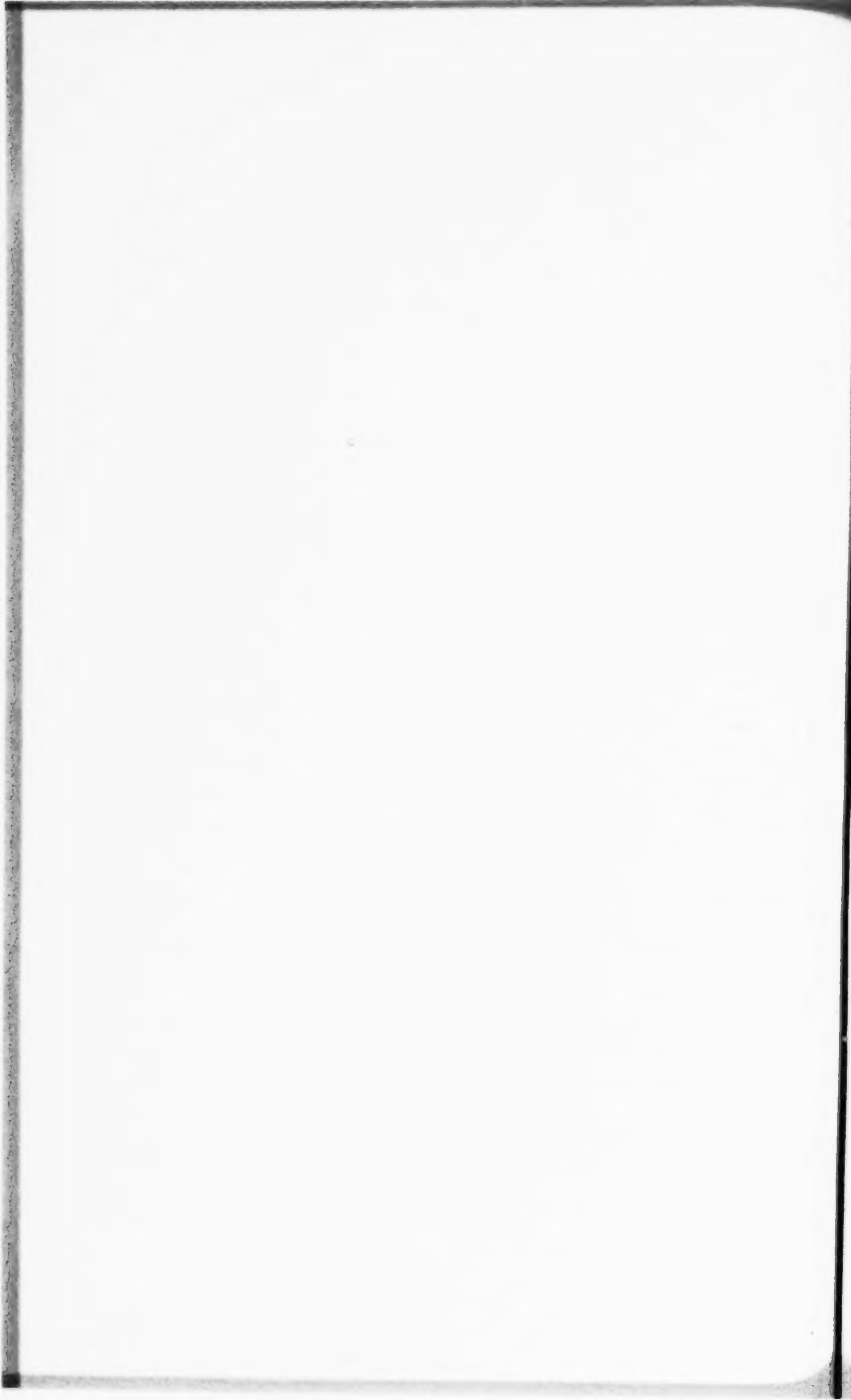
*vs.*

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

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[fol. 1] **COURT OF CLAIMS OF THE UNITED STATES**

No. C-5

**KUNHARDT & COMPANY, INC.,**

vs.

**THE UNITED STATES****I. HISTORY OF PROCEEDINGS**

On January 17, 1923, the plaintiff filed its original petition.

On February 16, 1923, the defendant filed a demurrer to said petition.

On March 5, 1923, the demurrer was submitted without argument by the defendant, and argued and submitted by Mr. Raymond Hudson, for the plaintiff.

**II. ORDER GRANTING LEAVE TO FILE AMENDED PETITION—Entered March 12, 1923**

The petition in this case alleges in a general way a loss due to depreciation in the boat "Herbert May." The court is of opinion that this item of the claim should be made more definite and certain and that the plaintiff should set forth in detail the exact facts with reference to this boat, the use to which it was put, and the basis on which a claim is made for compensation for depreciation.

It is therefore ordered by the court that pending the defendant's demurrer to the plaintiff's petition the plaintiff have leave to file an amended petition within thirty (30) days.

**[fol. 2] III. BILL OF PARTICULARS OR EXHIBIT "F" TO PETITION—Filed April 9, 1923**

Now comes the plaintiff in compliance with the requirements of the Court's order of March 12, 1923, and by way of a Bill of Particulars or Exhibit "F" to the petition, says:

[fol. 3] 1. That at a meeting in Washington in October prior to the execution of the purchase order Exhibit "C," November 6, 1918, the Government Officers urged on the claimant to agree to change the prior purchase orders and contracts, Exhibits "A," "B" and "B1" so that the claimant could deliver the beans in New Orleans as the Government was having difficulty finding transportation for the beans and the claimant had the schooner "Herbert May";

2. That at this time the claimant was negotiating a sale of the "Herbert May" and had an offer of \$75,000, but the Government insisted that the claimant provide transportation for the beans from Honduras and Guatemala to New Orleans and as the "Herbert May" was the only means of transportation available to claimant it was forced to retain possession of this schooner.

3. That the Government being in urgent need of beans was insisting that the claimant purchase and prepare to import the beans as rapidly as possible while the purchase order, Exhibit "C," was being prepared, the claimant accordingly had the "Herbert May" prepared for the trip to the West Indies and in the meantime arranged a cargo for the south-bound trip which the proper Government officers agreed the claimant might carry;

4. When the Government cancelled the contract the claimant under commitments for the south-bound trip was compelled to make the trip as the shippers would not release claimant and the claimant [fol. 4] was out of pocket on this trip for running the boat and insurance \$2,000;

5. That the claimant had no use for the boat prior to the purchase order of November 6, and was selling same and had no use for the boat after the Government cancelled the purchase order and the claimant was released from the shippers by making the trip and thereupon the claimant immediately began negotiations to sell the said schooner "Herbert May" and after using due diligence and their best efforts through different brokers and dealing direct with purchasers the claimant was only able to obtain \$40,000 for the boat, thus entailing a loss from depreciation in the value of the schooner of \$35,000.

Kunhardt and Company, Inc., By G. F. Kunhardt, President.

Affidavit of G. F. Kunhardt to above paper omitted in printing.

[fol. 5]

#### IV. FURTHER PROCEEDINGS

On April 23, 1923, the defendant filed a motion to dismiss the petition on the ground that filing the paper "Exhibit F to Petition" did not comply with the Court's order of March 12, 1923.

On May 7, 1923, the defendant's motion to dismiss was passed and plaintiff was ordered to file an amended petition.

Said amended petition is as follows:

#### V. AMENDED PETITION—Filed May 12, 1923

The claimant, Kunhardt & Company, Inc., respectfully represents:

1. That it is a duly created and existing corporation under the laws of the State of New York engaged in exporting and importing.

[fol. 6] 2. That on September 10, 1918, the Director of Aircraft Production through Captain O. R. Ewing, A. S. A. P. issued to claimant purchase order No. 810,030 copy of which is filed as Exhibit "A" to grow and ship only a minimum of 50,000 and to a maximum of 75,000 bushels of castor beans from Puerto Cortez, Honduras.

3. This purchase order No. 810,030 went into contract No. 4683 of September 16, 1918, between the said claimant and Captain O. R. Ewing, A. S. A. P. U. S. Army, a copy of which is herewith filed as Exhibit "B," in which contract as well as purchase order there was no cancellation clause, but the purchase order was amended September 20, 1918, as Re.O-810,030, which is filed as Exhibit "B1," but the amendment contained no cancellation clause.

4. That on November 6, 1918, the said Captain Ewing as aforesaid issued to the claimant purchase order No. 810,066, which is filed herewith as Exhibit "C" for a minimum of 75,000 to a maximum of 100,000 bushels of castor beans to be grown or purchased in Guatemala or Honduras, C. A., with delivery at New Orleans, in which the government reserved the privilege at any time to cancel the purchase part of this contract except the amounts for which the contractor has definitely obligated himself, but no rights were reserved for the cancelling of the other terms of the contract and this purchase order comes out of and takes the place of the purchase order and Exhibits A, B and B1.

5. That the claimant had proceeded to perform the said two purchase orders and contract Exhibits A, B and B1 and C and was carrying out the work when on November 14, 1918, a suspension of same was sent him in the following words and figures:

"Procurement Division

Materials Department

DWG-IB.

Nov. 14, 1918.

From: Office of the Director of Aircraft Production.

To: Kunhardt & Co., 17 Battery Place, New York.

Subject: Your Castor Bean Contract, Order No. 810066.

1. Owing to recent developments, it is requested that you do not make any additional purchases; or any additional plantings or sub-contracts for the planting of castor beans for the Government account.

2. It is further requested that you furnish this Bureau at your earliest convenience a statement showing the acreage of castor beans that you now have under cultivation. Also a statement showing the quantity of beans which you have purchased to apply on this Government contract and are obliged to take.

By direction of the Acting Director of Aircraft Production.

Chas. Mayer, Jr., Major A. S. A. P., Chief Castor Bean and Oil Sec."

This was followed a few days later by a cancellation of the two said purchase orders and contract, in neither of which was there any cancellation clause, except as to purchase of beans mentioned above, and the government refused to carry out and perform its part of the said purchase order and contract which was in violation of the terms thereof.

[fol. 8] 6. That after the said purchase order and contract No. 4683 had been violated and cancelled by the government, the government sent to the claimant contract No. 5346, which was dated some weeks ahead, namely November 12, 1918, which was executed by the said Captain O. B. Ewing, for the government and which the claimant was directed to execute, which it did, and the same was approved by the Director of Air Craft Production by Colonel A. C. Downey, December 19, 1918, more than a month after the said purchase orders and contract No. 4683 had been cancelled, the said contract No. 5346 is filed herewith as Exhibit "D" as part of this partition.

7. That the said action of the government in violating its agreement Exhibits "A," "B" and "C" and in cancelling same, contrary to the terms thereof, had caused this claimant heavy loss and damage to the amount of \$59,478.78; that negotiations were had between the government officers and the claimant for settlement of the loss of the claimant and a government officer, Mr. Joseph Shay, found and agreed with the claimant that there should be \$35,000.00 paid to the claimant and on January 30, 1919, contract No. 5346A was executed between the claimant and Captain S. M. Wiley, A. S. A. P., whereby the government agreed to pay the claimant \$35,000.00 in cash, cancelling contract No. 5346, which is Exhibit "D-1."

8. Of this \$35,000.00, \$24,478.78 was to cover certain items and the remaining \$10,521.22 was to be applied on the claim made by the claimant for depreciations of their loss on the boat "Herbert May," but this did not cover all of the claimant's loss on the boat, and claimant only agreed to accept this amount as it was greatly in need of money.

[fol. 9] 9. That at a meeting in Washington in October prior to the execution of the purchase order Exhibit "C," November 6, 1918, the Government Officers urged on the claimant to agree to change the prior purchase orders and contracts, Exhibits "A," "B" and "B1" so that the claimant could deliver the beans in New Orleans as the Government was having difficulty finding transportation for the beans and the claimant had the schooner "Herbert May."

10. That at this time the claimant was negotiating a sale of the "Herbert May" and had an offer of \$75,000 but the Government insisted that the claimant provide transportation for the beans from Honduras and Guatemala to New Orleans and as the "Herbert May" was the only means of transportation available to claimant it was forced to retain possession of this schooner.



11. That the Government being in urgent need of beans was insisting that the claimant purchase and prepare to import the beans as rapidly as possible while the purchase order, Exhibit "C," was being prepared, the claimant accordingly had the "Herbert May" prepared for the trip to the West Indies and in the meantime arranged a cargo for the south-bound trip which the proper Government officers agreed the claimant might carry.

12. When the Government cancelled the contract the claimant under commitments for the south-bound trip was compelled to make the trip as the shippers would not release claimant and the claimant was out of pocket on this trip for running the boat and insurance \$2,000.

[fol. 10] 13. That the claimant had no use for the boat prior to the purchase order of November 6, and was selling same and had no use for the boat after the Government cancelled the purchase order and the claimant was released from the shippers by making the trip and thereupon the claimant immediately began negotiations to sell the said schooner "Herbert May" and after using due diligence and their best efforts through different brokers and dealing direct with purchasers the claimant was only able to obtain \$40,000 for the boat, thus entailing a loss from depreciation in the value of the schooner of \$35,000.

14. That the government officers failed and refused to pay the said \$35,000.00 so agreed to be paid under contract No. 5346A above, but offered to and did execute contract No. 5346A, order No. 810-066, May 17, 1919, whereby the government agreed to pay claimant \$24,478.78 and cancelled contracts 4682 and 5346, Exhibits "B" and "D," and reserved for further adjudication the claimant's claim for depreciation on schooner "Herbert May," copy of which contract is herewith filed as Exhibit "E."

15. That the claimant fully complied with all agreements on its part and that on account of the cancellation and termination of the said agreements and in violation of the terms thereof the claimant suffered heavy loss and damages in addition to the \$24,478.78, which had been paid, to the extent of \$35,000.00 on the "Herbert May."

16. That the claimant is sole owner of the claim set forth in this petition, no assignment or transfer of the same or any part thereof or interest therein has been made. Claimant is justly entitled to receive and recover from the United States of America for and on [fol. 11] account of the violation of the said agreements the sum of \$35,000.00 after allowing all credits and set-offs. The claimant has at all time borne true allegiance to the Government of the United States and has not in any way aided, abetted or given encouragement to its enemies. The claimant believes the facts stated in this petition to be true.

Wherefore, Claimant prays judgment against the United States of America in the sum of \$35,000.00 and for such other and fur-

ther relief as this Honorable Court might grant, both at law and in equity, in the premises.

Kunhardt & Company, Inc., By Raymond M. Hudson, Its Attorney. Raymond M. Hudson, Attorney for Claimant, Continental Trust Building, Washington, D. C.

Affidavit of R. M. Hudson to above paper omitted in printing.

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EXHIBIT "A" TO PETITION

Clearance No. A-2731. Order No. 810,030

War Department

Bureau of Aircraft Production

Washington, September 10, 1918.

From: Office Director of Aircraft Production,

To: Kunhardt & Co., 17 Battery Place, New York.

[fol. 12] Subject: Order for growing of Castor Beans. (HSW.)

In accordance with terms of order and contract I am directed by the Bureau of Aircraft Production to place order with you for the articles listed below.

Inspection—Goods must be ready for inspection at your factory within (see note) days after receipt of order. When ready for inspection notify with attached Form 26-A the designated departments, sending original copy to the Castor Oil Section, Aircraft Procurement Division, Bureau of Aircraft Production, 4½ and Mo. Ave., N. W., Washington, D. C.

Items accepted should be packed for domestic shipment and furnished F. O. B. vessel at Puerto Cortez or at the option of the Government, at any United States port on the Gulf of Mexico (see note).

Forward from U. S. port on Government bill of lading which will be sent you by the Traffic Section, Bureau of Aircraft Production, 119 D. Street N. E., Washington, D. C. See instructions on reversed side.

Immediately after shipment the consignment should be listed in detail, the original copy of Form 27 (shipper's receipt), and one carbon copy on Form 27A (shipping notice), and these lists forwarded to the Traffic Section, Bureau of Aircraft Production, 119 D Street N. E., Washington, D. C., accompanied by memorandum copy of bill of lading.

Bill upon Forms 330A and 29 inclosed herewith observing carefully the instructions on the reverse side of Form 330 A.

Shipping instructions and ma-king:—

[fol. 13] Shipping instructions will be furnished you later.

Marked: "Order No. 810,030, Aero."

## Item

1. 50,000 minimum to 75,000 maximum, bushels first quality mature Castor Beans properly harvested, stored and sacked, and reasonably suitable for the procurement therefrom of castor oil which will conform to the Bureau of Aircraft Production Specification No. 3500-A, (46 lbs. per bushel) @ \$— per bushel (see note), \$—.

NOTE—Price to be \$3.00 per bushel f. o. b. vessel at Puerto Cortez, or if the government exercises its option to accept delivery at gulf ports, in the United States, the price is to be \$3.50 per bushel f. o. b. docks, contractor to pay all import duties.

Payment will be made upon receipt of properly prepared vouchers in the office of the Disbursing Officer at Washington, upon telegraphic advice of inspection and acceptance of beans at Puerto Cortez. In case beans are to be delivered to the United States gulf ports, contractor will be paid only \$3.00 per bushel upon inspection and acceptance of beans at Puerto Cortez and the remainder upon delivery in the United States.

Contract No. 4683 will follow.

App. A. S. P. 19 (507).

T. R.

27. Copies to (std-7) (A P Insp4) (A P Exp14).

(A Pst Mat Oil 2).

(A P Ped Spec) 1. Incls. 5.

(A Pst Con Cor) (A Pst Con Cts7).

For Aeronautical purposes.

[fol. 14]

(See Sheet No. 2)

In case contractor is to deliver at United States gulf ports he guarantees delivery and will refund any payments that have been made for beans lost in transit.

Contractor agrees to furnish free storage at Puerto Cortez not to exceed sixty days.

Contractor will furnish bond in the sum of \$15,000.00 to insure the deliveries hereinunder specified at both Puerto Cortez and United States gulf ports.

Free access to the fields, on which the beans are being grown, which beans are to be applied against the contract, shall at all times be given to duly authorized representatives of the Government.

Delivery of above to be completed by August 31, 1919.

O. R. Ewing, Captain A. S., A. P. 27 copies.

## EXHIBIT "B" TO PETITION

## Form No. 13

## Bureau of Aircraft Production

Contract No. 4688. Order No. 810,030. Proposal No. —. Req. No. B-6111.

This contract, made this sixteenth day of September, nineteen hundred and eighteen, between the United States of America, party of the first part, hereinafter called the "Government," represented by O. R. Ewing, Captain, A. S. A. P., U. S. Army, and Kunhardt & Company, a corporation with an office at 17 Battery Place, in the [fol. 15] city of New York, in the county of New York, State of New York, party of the second part, hereinafter called the "Contractor." Witnesseth, that in conformity with the advertisement, specifications, and proposals referred to in the order quoted below, and which, in so far as they relate to this contract, form a part of it, the said parties do covenant and agree with each other as follows, viz:

Article I. That the said Contractor shall furnish to the Government the material described in Order No. 810,030 copy herewith, which together with all authorized amendments thereto, is hereby made a part of this contract.

Art. II. That the deliveries of the supplies and materials herein contracted for shall be made in the manner, numbers, or quantities specified in the order.

Art. III. All supplies and materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as do not conform to the specifications set forth in this contract shall be rejected. The decision of the Director of Aircraft Production as to quality and quantity shall be final. Until final inspection and acceptance of, and payment for, all of the supplies and materials and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the Government to reject any defective articles or supplies or to require the fulfillment of any of the terms of the contract.

Art. IV. That for and in consideration of the faithful performance of the stipulations of this contract, the Contractor shall be paid at the office of the party of the first part for all supplies and materials delivered in conformity with the requirements of this contract, on [fol. 16] or before the dates specified, and accepted, the prices stipulated in aforementioned order, making a total consideration of two hundred sixty two thousand five hundred dollars (\$262,500.00), more or less, in accordance with the terms of order 810,030, to be paid as soon as practicable after the acceptance of the same, in fund furnished by the Government for the purpose.

Art. V. In the event of the failure of the said contractor to perform the stipulations of this contract within the time and in the manner specified herein, the Government may elect one of the following courses: (a) May rescind the contract; (b) may supply the deficiency by purchase in the open market or otherwise, charging the said Contractor with any loss occasioned by a difference between such purchase price and the original contract price; (c) may take over from the Contractor any or all items completed or in process of manufacture, payment for which shall be the difference between the contract price and the cost to the Government of having the articles or equipment completed; (d) or may permit the said Contractor to complete delivery within a reasonable time after the date or dates specified herein, and in this event liquidated damages shall be deducted as and if provided in the attached order.

Art. VI. The Contractor further agrees to hold and save the Government harmless from and against every demand, or demands, of any nature or kind for, or on account of, the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this contract.

Art. VII. Neither this contract nor any interest herein shall be [fol. 17] transferred to any other party or parties, and in case of such transfer the Government may refuse to carry out this contract either with the transferor or the transferee, but all rights of action for any breach of this contract by said Contractor are reserved to the Government.

Art. VIII. No Member of or any Delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom."

Art. IX. The Contractor expressly warrants that it has employed no third person to solicit or obtain this contract on its behalf, or to cause or procure the same to be obtained upon compensation in any way contingent, in whole or in part, upon such procurement; and that it has not paid, or promised or agreed to pay, to any third person, in consideration of such procurement, or in compensation for services in connection therewith, any brokerage, commission, or percentage upon the amount receivable by it hereunder; and that it has not, in estimating the contract price demanded by it, included any sum by reason of any such brokerage, commission, or percentage; and that all moneys payable to it hereunder are free from obligation to any other person for service rendered, or supposed to have been rendered, in the procurement of this contract. The Contractor further agrees that any breach of this warranty shall constitute adequate cause for the annulment of this contract by the Government and that the Government may retain to its own use from any sums due or to become due thereunder an amount equal to any brokerage, commission, or percentage so paid, or agreed to be paid.

[fol. 18] Art. X. That it is expressly agreed and understood that this contract shall be non-effective until an appropriation adequate to its fulfillment is made by Congress and is available.

Art. XI. That this contract shall be subject to approval of the Director of Aircraft Production or of any person designated by him.

In witness whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

United States of America, By O. R. Ewing, Captain, A. S. A.  
P. Kuhnhardt & Co., Inc., By H. R. Kunhardt, President. Witnesses: Ruby Paul, Irene Handley, Albert L. Rohrberg, Anthony J. Garcia.

Approved: Oct. 7, 1918.

By authority of the Director of Aircraft Production.

(Authorization of June 7, 1918.)

A. C. Downey, Lt. Col. A. S. A. P.

# EXHIBIT "B-1" TO PETITION

Re. O-810,030. En-465

War Department

Bureau of Aircraft Production

Washington

Contract Department. Aircraft Procurement Division.

[fol. 19]

September 20, 1918.

Smith-En.

From: Office, Director of Aircraft Production.

To: Kunhardt & Co., 17 Battery Place, New York City.

Subject: Amendment of Order.

1. Reference is made to Aircraft Production Order No. 810,030, placed with you September 11, 1918, for castor beans.

2. In accordance with your letter of September 17, 1918, the order is hereby amended by the addition of the following provision for inspection:

"The Government will appoint an inspector for the acceptance and inspection of beans at Puerto Cortez whenever contractor is able to tender a lot of 1,000 bushels for such inspection. It is understood that the Inspection Department will be notified several weeks before the first lot of 1,000 bushels will be ready so that inspector may be sent to Puerto Cortez and that after that, deliveries will be made regularly so that the inspector may remain to receive the lots as tendered; One thousand bushels shall be considered the unit calling for prompt inspection."

3. Also in accordance with your letter of September 17, 1918, and in view of the Government option to have deliveries made at the gulf ports in the United States, the last line on Sheet 2 of the order is hereby amended by inserting the words "at warehouse, Puerto Cortez, ready for inspection," thus making that line read as follows:

"Delivery of above at warehouse, Puerto Cortez, for inspection, to be completed by August 31, 1919."

[fol. 20] By direction of the Acting Director of Aircraft Production.

O. R. Ewing, Captain A. S. A. P.

Cys: (A AP TRF) (A AP CON Cts5) (A AP CON Abs)  
(A AP MAT OIL) (A F DIS) (A AP MAT BEAN) (A P  
PED) (A P. EXPI) (A P INSP 3) (A AP CON REC) (A  
EX PROG).

### EXHIBIT "C" TO PETITION

Order No. 810,066

War Department

Bureau of Aircraft Production

Washington, November 6, 1918.

A AP MAT Bean.

From: Office, Director of Aircraft Production.

To: Kunhardt & Co., 17 Battery Place, New York, N. Y.

Subject: Order for Castor Beans.

In accordance with terms of order and contract (HSW), I am directed by the Director of the Bureau of Aircraft Production to place order with you for the articles listed below.

Inspection.—Goods must be inspected before shipment unless otherwise specified. When ready for inspection, notify with attached form 26-B the designated departments, sending original copy to Lieut. Goetz, 4½ St. and Mo. Ave., N. W. Washington, D. C.

Delivery.—Goods must be securely packed and delivered to consignee at your expense, to be completed by August 31, 1919.

Bill upon Forms 330A and 29, inclosed, observing carefully the instructions on the reverse side of Form 330A.

[fol. 21] Shipping instructions and marking: —.

Shipping instructions on beans arriving at New Orleans will be given you later.

Marked "Order 810,066 Aero."

### Item

1. 75,000 bushels minimum to 100,000 bushels maximum (1 bushel equals 46 lbs.) good quality, whole, sound, mature, castor

beans to be shipped in sound and good condition, having been properly harvested and hulled, @ \$.098 per pound, net landed weight ex dock, New Orleans, La., \$—.

NOTE.—The above price to include War Insurance and import duty of \$.003 per pound, beans to be packed in suitable bags, cost value of which is included in this price.

Beans to be grown or purchased in Guatamala or Honduras, C. A.

The Government will have the privilege at any time to cancel the purchase privilege of this contract, except the amounts for which the contractor has definitely obligated himself. The Contractors are to keep the Bureau of Aircraft Production advised as they make purchases of castor beans on the purchase privilege of this contract and can guarantee actual delivery.

Basis impurities not to exceed 3%.

Payment will be made upon receipt of properly prepared vouchers in the office of the Disbursing Officer at Washington on telegraphic advice of inspection and acceptance at New Orleans. Contractor will furnish bond in the sum of \$15,000.00 to insure deliveries hereunder specified.

O. R. Ewing, Captain A. S. A. P.

For Aero use. Appl. A. S. P., 19 (507). T. R.  
[fol. 22] 27 Copies to (STD 7) (A P INSP 9) (APEXP 14)  
(A P PACK) (A AP MAT Bean 2) (A AP CON Co. Incls. (A  
AP CON Cts 7) 1.

Contract No. 5346 will follow.

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#### EXHIBIT "D" TO PETITION

Contract No. 5346. Order No. 810,036. Proposal No. NSW. Req.  
No. B-8842

B. A. P. Form No. 60

#### Bureau of Aircraft Production

This Contract, made this 12th day of November, nineteen hundred and eighteen, between the United States of America, party of the first —, represented by F. D. Schnacke, Captain A. S. A. P., U. S. Army, and Kunhardt & Company, a corporation with an office in the city of New York, in the county of New York, State of New York, party of the second part, hereinafter called the "Contractor," witnesseth, that in conformity with the advertisement, specifications, and proposal referred to in the order quoted below, and which, in so far as they relate to this contract, form a part of it, the said parties do covenant and agree with each other as follows, viz:

Article I. That the said Contractor shall furnish to the United States the material described in Order No. 810,066, a copy of which



is hereto attached and which, together with all authorized amendments thereto, is hereby made a part of this contract.

Art. II. That the deliveries of the supplies and materials herein [fol. 23] contracted for shall be made in the manner, numbers or quantities specified in the order.

Art. III. The articles or work are subject to observation, inspection, and tests by the United States at any and all times during manufacture or performance, in order to determine their compliance with the requirements of this contract, and are subject to acceptance or rejection by the United States at the point specified in the order. For these purposes the United States may maintain an inspector or inspectors at the plants or places where and during the time this contract is being performed. Such inspectors may reject any and all articles or work, or components thereof, and materials found not to be in compliance with the requirements of this contract. No preliminary test or acceptance shall preclude the United States from rejecting any articles or work upon final inspection or test at completion. The contractor shall furnish all reasonable facilities and assistance requested by such inspectors for the performance of their duties. Inspections and tests by the United States shall be carried out in such a manner as not unduly to delay the performance of this contract by the Contractor. Nothing contained in this Article shall limit or annul any inspection or test which may be called for by any drawings and specifications referred to in said order. No inspection, acceptance, or payment under this contract shall deprive the United States of any claim against the Contractor hereunder by reason of fraud or deception, or by reason of latently defective articles, materials, or workmanship.

Art. IV. That for and in consideration of the faithful performance of the stipulations of this contract, the Contractor shall be paid [fol. 24] at the office of the party of the first part for all supplies and materials delivered in conformity with the requirements of this contract, and accepted, on or before the dates specified, the prices or consideration stipulated in the aforesaid order, which shall be paid as soon as practicable after the acceptance of the same in funds furnished by the Government for the purpose.

Art. V. Section 1. In the event of the Contractor's default in making deliveries at the times and in the quantities herein specified, or in performing the work at the times and in the manner herein provided, the Contracting Officer may at any time and from time to time, at his option, by giving written notice to the Contractor, cancel on behalf of the United States the delivery or performance of all or any part of the articles or work then in arrears, and such cancellation shall be deemed to be effective from such date as may be specified in said notice. Articles or work completely manufactured or completely performed in accordance with the requirements of this contract at the date any cancellation above permitted is to become effective shall be accepted and upon delivery shall be paid for by the United States at the contract price or compensation. Any such can-

cellation shall be without prejudice to any other rights or remedies or to any claim against the Contractor which the United States may have by reason of such default or otherwise.

Sec. 2. If, in the opinion of the Director of Aircraft Production, the public interest shall so require, this contract may be terminated by the United States by ten (10) days' notice after the giving of such notice, and shall be without prejudice to any claims which the United [fol 25] States may have against the Contractor under this contract. After the receipt of such notice the Contractor shall not order any further materials or facilities, or enter into any further subcontracts, or make any further purchases in connection with the performance of this contract, without written consent previously obtained from the Contracting Officer, but inspection of the completed articles or work and acceptance thereof by the United States in accordance with the terms of this contract shall continue during such period of ten (10) days as though such notice had not been given. In the event of and upon such termination of this contract prior to completion, as provided in this Section (2), for any reason other than the default of the Contractor, the United States shall make payments to and protect the Contractor as follows: (a) The United States shall pay to the Contractor the contract price or compensation, not previously paid, for all articles or work completely manufactured or completely performed in accordance with the requirements of this contract at the date such termination becomes effective. (b) The United States shall reimburse the Contractor for such proportion of the Contractor's expenditures (other than expenditures for plant, facilities, and equipment solely provided for the performance of this contract) made by the Contractor in good faith in connection with the performance of this contract, as is fairly and properly apportionable to the articles or work the delivery or performance of which is so terminated, plus ten (10%) per cent of the amount so ascertained. Any raw materials, articles in process of manufacture, and other property so paid for shall become the property of the United States. (c) The United States shall protect the Contractor against [fol. 26] such proportion of the Contractor's outstanding obligations, incurred by the Contractor in good faith in connection with the performance of this contract, as is properly and fairly apportionable to the articles of work, the delivery or performance of which is so terminated. The facts to be determined under the above subdivisions (b) and (c) shall be determined by agreement between the Contractor and the Contracting officer, and in event of their failure to agree shall be determined by three persons, one to be appointed by the Contractor, one by the Contracting Officer, and the third by these two. (d) The United States shall also pay to the Contractor on account of depreciation or amortization of plant, facilities, and equipment, solely provided by the Contractor at its expense for the performance of this contract, an amount to be determined as follows: As soon as conveniently may be done after such termination of this contract, the fair market value of such plant, facilities, and equipment at the time of such termination shall be determined by an ap-

praisement to be made by three appraisers, one to be appointed by the Contractor, one by the Contracting Officer, and the third by these two. The United States shall then pay to the Contractor such part of the amount by which the cost to the Contractor of such plant, facilities, and equipment shall exceed such appraised fair market value thereof as shall be fairly and properly apportionable; due regard shall be had to the extent to which this contract shall have been performed and the extent to which the cost of said plant, facilities, and equipment shall be regarded as having been absorbed by such performance. The amount so fairly and properly apportionable shall be determined by agreement between the Contractor and the Contracting Officer, if possible, and in the event of their failure to agree shall be determined by three persons, one to be appointed by the Contractor, one by the Contracting Officer, and the third by these two. In the event of the termination of this contract under, this Section (2), any and all obligations of the United States to make any payments to the Contractor under this contract, other than those specified or provided for in this Section (2), and in Article VI hereof shall at once cease and determine.

Sec. 3. In the event of the cancellation and termination of this Contract pursuant to the provisions of the above Sections 1 or 2, the Contractor shall, upon the request of the Contracting Officer, assign to the United States, or to such person as the Contracting Officer may direct, the unperformed portion of any or all contracts and subcontracts made by the Contractor in contemplation of or in connection with the performance of this Contract. In the event of the failure of the Contractor to assign any such contract or subcontract as herein provided, this Contract shall operate as such assignment. It is understood that such assignment in and of itself shall not compel the United States to assume or become responsible for any obligation of the Contractor which has arisen prior to such an assignment by reason of the Contractor's performance of, or failure to perform, the contract or subcontract so assigned.

Sec. 4. In the event of the cancellation or termination of this Contract, pursuant to the provisions of the above Sections 1 or 2, the United States may proceed at the Contractor's plant to complete the manufacture or performance of the articles or work herein contracted for, or any part thereof, as well as to manufacture additional articles or perform additional work out of materials and property then on hand, for the performance of this Contract, and for these purposes may take possession of and use any or all of the plants and properties of the Contractor used in the performance of this Contract.

If the United States shall take possession of and use any of the plants and properties of the Contractor as above permitted, the United States shall pay to the Contractor such reasonable sum for the use thereof as may be agreed upon between the Contracting Officer and the Contractor, or, if they fail to agree, as may be determined in the manner and with the effect provided in Article XVII hereof. Such plant and properties shall be occupied and used by the United States

without cost or expense to the Contractor; the United States, however, reserving any claim which it may have against the Contractor under this contract.

Art. VI. If the Contractor will hold and save the United States, its representatives and all other persons acting for it as agent, contractor or otherwise, harmless from all demands or liabilities for alleged use of any patented or unpatented invention, secret process or suggestion, or in the making or supplying of, the articles or work herein contracted for, and for alleged use of any patented invention in using such articles or work for the purpose for which they are made or supplied, to the extent that such use is not specifically prescribed in writing by the United States for the performance of this contract or where the demand for liability is based on patents that [fol. 29] are owned or controlled by, or under which and to the extent that rights are enjoyed by, the Contractor, its officers or employees, or persons in privity with the Contractor; and if and when required will discharge and secure the United States from all demand or liability on account thereof by proper release from the patentees or claimants, and by bond or otherwise and to the satisfaction of the Director of Aircraft Production.

The United States, will, without limitation to the time of completion of this contract in other respects, hold and save the Contractor, its representatives, and all other persons acting for it as agent, subcontractor, or otherwise, harmless from all demands or liabilities for alleged use of any patented or unpatented invention, secret process, or suggestion in, or in making or supplying, the article or work herein contracted for, and for alleged use of any patented invention in using such articles or work for the purpose for which they are made or supplied, to the extent that such use is specifically prescribed in writing by the United States for the performance of this contract and where the demand or liability is based on patents that are not owned or controlled by or under which rights are not enjoyed by the Contractor, its officers, or employees, or persons in privity with the Contractor; provided immediate notice of any such demand or liability and of any legal proceedings connected therewith is given in writing by the Contractor to the Director of Aircraft Production; and, provided further, that the United States may intervene in such demand or proceeding and in its discretion may defend the same or make settlement thereof, and the Contractor [fol. 30] shall furnish all information in its possession and all assistance of its employees requested by the United States.

Art. VII. Neither this contract, nor any interest herein, shall be transferred by the Contractor to any other party, except to the extent permitted by Section 3477, United States Revised Statutes.

Art. VIII. No Member of or Delegate to Congress, or Resident (commissioner) is or shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this Article shall not apply to this contract so far as it may be within the operation or exceptions of Section 116 of the act of Congress approved March 4, 1909 (35 Stats., 1109).

Art. IX. The Contractor expressly warrants that it has employed no third person to solicit or obtain this contract in its behalf, or to cause or procure the same to be obtained upon compensation in any way contingent, in whole or in part, upon such procurement; and that it has not paid, or promised or agreed to pay, to any third person, in consideration of such procurement, or in compensation for services in connection therewith, any brokerage, commission, or percentage upon the amount receivable by it hereunder; and that it has not, in estimating the contract price or compensation demands by it, included any sum by reason of any such brokerage, commission, or percentage; and that all moneys payable to it hereunder are free from obligation to any other person for services rendered, or supposed to have been rendered, in the procurement of this contract. The Contractor further agrees that any breach of this warranty shall constitute adequate cause for the annulment of this contract by the [fol. 31] United States, and that the United States may retain to its own use from any sums due or to become due hereunder an amount equal to any brokerage, commission, or percentage so paid or agreed to be paid.

Art. X. The United States may, at its option, furnish to the Contractor any or all of the component parts and materials for the performance of this contract at any time before the Contractor, in good faith, shall have made commitments for the same, and the United States may thereupon deduct from any payments due to the Contractor hereunder the cost to the United States of such component parts and materials, including the cost of delivery f. o. b. cars at or near the Contractor's plant, such deduction, however, not to exceed the amount for which the Contractor might have acquired the same. Any component parts and materials furnished by the United States hereunder shall comply with the requirements of this contract and shall at all times remain the property of the United States, unless paid for by the Contractor as above provided. The Contractor shall use, and be responsible to the United States for, due and proper care in using, protecting, handling, and storing component parts and materials so belonging to the United States, and, except to the extent that the contract may provide that such component parts and materials shall become the property of the Contractor, shall account to the United States for the same, either in finished product, scrap, unused component parts and materials, or otherwise, and shall make such disposition thereof, for the account of the United States, as the Contracting Officer may direct in writing.

[fol. 32] Art. XI. The articles or work shall be packed, boxed, and marked by the Contractor in the manner provided in the attached order, or, in the absence of specific provisions therein, in accordance with the directions of the Contracting Officer.

Art. XII. Changes in the drawings and specifications referred to in said order and forming a part of this contract may be made from time to time by the Contracting Officer by giving written notice of such changes to the Contractor. The contract price or compensation

of any articles or work manufactured or performed in accordance with such changed drawings and specifications shall be modified to conform to any increase or decrease in the cost of manufacture or performance due to such changes. The Contractor's time for performance of this contract shall be extended to cover any delay in performance caused to the Contractor by such changes. The amount of such increase or decrease in price or compensation, as well as of any extension of time for performance, shall be determined by agreement between the Contractor and the Contracting Officer, and in the event of failure to agree shall be determined in the manner and with the effect provided in Article XVII hereof.

Art. XIII. The Contractor shall not be held responsible for, or be deemed to be in default hereunder by reason of delays in the performance of this contract caused by strikes, fires, explosions, riots, acts of God, failure of transportation, or other causes beyond the control and without the fault of the Contractor, including delays caused to the Contractor by the direct act or failure to act of the United States, and the Contractor's time for performance of this contract shall hereby be ex-[fol. 33] tended to cover the delay in performance so caused to the Contractor; Provided, That the Contractor shall have immediately and fully notified the Contracting Officer of any such cause of delay and shall have used its best efforts promptly to remove the same and to obviate the effects thereof: And provided further, That such delay shall not have been due to the Contractor's failure to comply with any of the provisions of this contract. The Contractor shall proceed with the performance of this contract as soon as, and to the extent that any such cause of delay shall have been removed. The United States, however, shall have the right, by giving written notice to the Contractor, to relieve itself in whole or in part from the obligation to accept the delivery or performance of the articles or work which has been so delayed, in which event the United States shall make payments to and protect the Contractor (with respect to the articles or work as to which the United States shall have relieved itself of the obligation to accept delivery or performance) in the same manner as provided in Section (2) of Article V hereof.

Art. XIV. The Contractor agrees not to create or suffer to be created any lien or encumbrance against the articles or work or against any property entering into their manufacture or performance, and in the event any such lien or encumbrance is created, the Contractor agrees promptly to pay and discharge the same or to furnish proper bond and security to have the same released, to the end that the articles or work may become the property of the United States free and unencumbered. In case the Contractor shall fail to pay and [fol. 34] discharge any such lien or encumbrance, or to furnish proper bond or security to have the same released, the United States may do so at the Contractor's expense and may deduct from any payments due to the Contractor hereunder the amount of any expense so incurred by the United States.

Art. XV. The Contractor shall take all reasonable precautions for the protection of the plant and property to be used in the performance of this contract, and the work in progress hereunder, against espionage, fire, explosions, acts of war, and acts of enemy aliens, and shall provide such additional watchmen, and devices, and adopt such particular measures for the protection of such plant, property and work as the Contracting Officer shall from time to time direct. The Contractor shall, when required, report to the Contracting Officer the citizenship, country of birth, or alien status of any or all of its employees. When required by the Contracting Officer, the Contractor shall refuse to employ, or, if already employed, shall forthwith discharge from employment and exclude from its plants, any person or persons designated by the Contracting Officer, for cause, as undesirable for employment in a plant engaged on work for the United States. Failure to comply with any or all of the provisions of this Article shall render the Contractor responsible for all loss or damage to the United States arising from any of the hazards herein sought to be guarded against and shall also be cause for the cancellation of this contract. The United States shall pay to the Contractor as an addition to the contract price or compensation, or as part of the cost of the articles or work herein contracted for, any additional expense incurred by the Contractor, which, in the opinion of the Contracting Officer, is an additional expense created by the enforcement of this Article and resulting from action taken by the Contractor beyond or in addition to said above mentioned reasonable precautions.

Art. XVI. No contract shall be made by the Contractor with any other person for furnishing any of the completed or substantially completed articles or work herein contracted for without the written approval of the Contracting Officer. Every contract and subcontract made by the Contractor in contemplation of or in connection with the performance of this contract shall state that it relates to this contract and shall contain a provision that its unperformed portion may be assigned at any time by the Contractor to the United States, or its nominee.

Art. XVII. Except as otherwise specifically provided in this contract any claims, doubts, or disputes which may arise under this contract, or as to its performance or nonperformance, and which are not disposed of by mutual agreement, may be determined, upon petition of the Contractor, by the Secretary of War or his duly authorized representative or representatives. If the Secretary of War selects a board as his authorized representative to hear and determine any such claims, doubts, or disputes, the decision of the majority of said board shall be deemed to be the decision of the board. The decision of the Secretary of War or of such duly authorized representative or representatives shall be final and conclusive on all matters submitted for determination: Provided, That where the decision is rendered by [fol. 36] such representative or representatives, the Secretary of War may, at his option, either upon his own motion or upon petition filed with him by the Contractor within twenty (20) days after notice



of the decision of such duly authorized representative or representatives has been served upon him, review the action of such representative or representatives and render his decision thereon. Any sum or sums allowed to the Contractor under the provisions of this Article shall be paid by the United States as part of the cost of the articles or work herein contracted for and shall be deemed to be within the contemplation of this contract.

Art. XVIII. In the event that labor disputes shall arise directly affecting the performance of this contract and causing or likely to cause any delay in making the deliveries and the Secretary of War or his representative shall have requested the contractor to submit such disputes for settlement, the Contractor shall have the right to submit such disputes to the Secretary of War for settlement. The Secretary of War may thereupon settle or cause to be settled such disputes, and the parties hereto agree to accede to and to comply with all the terms of such settlement. If the Contractor is thereby required to pay labor cost higher than those prevailing in the performance of this contract immediately prior to such settlement, the Secretary of War or such representative in making such settlement, and as a part thereof, may direct that a fair and just addition to the contract price shall be made therefor: Provided, however, That the Secretary of War or his representative shall certify that the Contractor has in all respects lived up to the terms and conditions of the contract or shall waive in writing for this purpose only any breach that may have occurred. If [fol. 37] such settlement reduces such labor cost to the contractor, the Secretary of War or his representative may direct that a fair and just deduction be made from the contract price. No claim for addition shall be made unless the increase was ordered in writing by the Secretary of War or his duly authorized representative and such addition to the contract price was directed as part of the settlement. Every decision or determination made under this Article by the Secretary of War or his duly authorized representative shall be final and binding upon the parties hereto.

Art. XIX. All work required in carrying out this contract shall be performed in full compliance with the laws of the State, Territory, or District of Columbia, where such labor is performed: Provided, That the Contractor shall not employ in the performance of this contract any minor under the age of 14 years or permit any minor between the age of 14 and 16 years to work more than eight hours in any one day, more than six days in any one week, or before 6 a. m. or after 7 p. m. Nor shall the Contractor directly or indirectly employ any person undergoing sentence or imprisonment at hard labor which may have been imposed by a court of any State, Territory, or municipality having criminal jurisdiction: Provided, however, That the President of the United States may by Executive order modify this provision with respect to the employment of convict labor and provide the terms and conditions upon which such labor may be employed. These provisions shall be of the essence of the contract.

Art. XX. (a) The Contractor shall from time to time, and whenever so requested, furnish to the Director of Aircraft Production, or



[fol. 38] to such person as the Director of Aircraft Production may designate, statements and reports on the progress of the performance of this contract and full information on all factors relating to deliveries or performance hereunder. Representatives of the United States shall have the privilege of visiting all offices and plants of the Contractor for the purpose of ascertaining the progress of the performance of this contract and full information on all factors relating to deliveries or performance hereunder. Representatives of the United States shall have the privilege of visiting all offices and plants of the Contractor for the purpose of ascertaining the progress of the performance of this contract under regulations prescribed by the Director of Aircraft Production.

(b) Any notice to the Contractor under this contract, when not actually delivered in writing to the Contractor, shall be deemed to have been sufficiently given when mailed in a sealed, postpaid wrapper addressed to the Contractor at the address above set forth. Any notice to the United States under this contract, when not actually delivered in writing to the Director of Aircraft Production, shall be deemed to have been sufficiently given when mailed in a sealed, postpaid wrapper addressed to the Director of Aircraft Production, War Department, Washington, D. C.

Art. XXI. This contract shall be noneffective until an appropriation adequate to its fulfillment is made by Congress and is available.

Art. XXII. This contract shall be subject to the approval of the Director of Aircraft Production, or of any person designated by him.

In witness whereof, the parties aforesaid have hereunto placed [fol. 39] their hands the date first hereinbefore written.

(Executed in quintuplicate.)

United States of America, By F. D. Schnacke, Capt. A. S. A. P. Kunhardt & Co., Inc. H. R. Kunhardt, Pres.  
Witnesses: Irene Handley, Dally E. Wallace, Bertha Blumer, A. L. Rohrberg.

Approved Dec. 19, 1918.

By authority of the Director of Aircraft Production.

(Authorization of June 7, 1918.)

#### EXHIBIT "D-1" TO PETITION

A. C. Downey, Lt. Col. A. S. A. P.

Contract No. 5346-A. Order No. 810,066

Bureau of Aircraft Production

United States Army

This contract, made this 30th day of January, 1919, by and between the United States of America, party of the first part, herein-

after called the government, represented by S. M. Wiley, Captain A. S. A. P., hereinafter called the "Contracting Officer" acting by the authority and under the direction of the Secretary of War, and [fol. 40] Kunhardt & Company, a corporation with an office in the City of New York, State of New York, party of the second part hereinafter called "Contractor," witnesseth that:

Whereas, the parties hereto did on November 12, 1918, enter into a certain contract known as Contract No. 5346, for the purchase by the Government from the Contractor of certain Castor beans, and

Whereas, no beans have yet been delivered under said contract and the furnishing and delivery of any beans thereunder did exceed the present requirements of the government; and

Whereas, it is in the public interest to terminate said contract as herein provided; and

Whereas, the contractor, in pursuance of the said contract has incurred expenses and obligations for the purpose of furnishing and delivering the said beans under said contract; and

Whereas, the Contracting Officer has caused an investigation to be made of such expenses and obligations; now therefore, in consideration of the promises and of the mutual covenants and agreements hereinafter made, he parties hereto mutually consent and agree as follows:

#### "EXHIBIT D"

##### Article I.

The contractor shall not furnish or deliver and the United States shall not accept or pay for any articles or work agreed to be delivered under said contract.

##### Article II

The United States shall pay forthwith to the contractor the sum [fol. 41] of thirty-five thousand dollars (\$35,000) which sum shall constitute full and final compensation for services rendered, and expenditures and obligations incurred by the contractor under said contract.

##### Article III

The contractor does hereby for itself, its successors and assigns, remise, release and forever discharge the United States of and from all manners of debts, dues, sum or sums of money, accounts, reckonings, claims and demands whatsoever, due or to become due, in law or in equity, under or by reason of, or arising out of said contract No. 5346. Upon the receipt of the amount herein agreed to be paid, the contractor shall execute and deliver to the United States such further or additional instruments of receipt or release as the United States shall demand.

## Article IV

This agreement shall not become a binding and valid obligation of the government unless and until the approval of the Board of Contract Review of Aircraft Production has been noted in the end of this instrument.

In witness whereof, the parties hereto have caused this instrument to be executed by their respective representatives hereto duly authorized the day and year first above written.

United States of America, By (Sgd.) S. M. Wiley, Captain [fol. 42] A. S. A. P. Kunhardt & Company, Inc., By (Sgd.) H. R. Kunhardt, Jr., President. Witnesses: (Sgd.) H. M. Burnett. (Sgd.) Anthony R. Garcia, Notary Public, Kings County, No. 237. Certificate registered New York County, No. 367.

Approved, Board of Contract Review of the Bureau of Aircraft Production.

— — —, Captain, A. S. A. P. Secretary.

A true copy: (Sgd.) Homer Rogers. Homer Rogers, 1st Lieut., A. S. A. P.

## EXHIBIT "E" TO PETITION

## Copy

Contract No. 5346-A. Contract No. 810,066

## Air Service

## United States Army

This contract, made this 17th day of May, 1919, by and between the United States of America, party of the first part, hereafter called the government, represented by S. M. Wiley, Captain, A. S. A. P., hereafter called the "Contracting Officer" acting by the authority and under the direction of the Secretary of War, and Kunhardt & Company, a corporation with an office in the City of New York, State of New York, party of the second part, hereafter called the "Contractor," Witnesseth that:

[fol. 43] Whereas the parties hereto did on November 12, 1918, enter into a certain contract, known as Contract No. 5346 which superseded contract No. 4683 for the purchase by the Government from the Contractor of certain Castor beans; and

Whereas, no beans have yet been delivered under said contract, and the furnishing and delivering of any beans thereunder and exceed the present requirements of the government; and

Whereas, it is in the public interest to terminate said contract as herein provided; and

Whereas, the contractor, in pursuance of the said contract, has incurred expenses and obligations for the purpose of furnishing and delivering the said beans under said contract; and

Whereas, the contracting officer has completed an investigation to be made of such expenses and obligations;

Now therefore, in consideration of the premises and of the mutual covenants and agreements hereinbefore made, the parties hereto mutually covenant and agree as follows:

### Article I

The contractor shall not furnish or deliver, and the United States shall not accept or pay for any articles or work agreed to be delivered under said contract.

### Article II

The United States shall pay forthwith to the contractor the sum of twenty four thousand four hundred seventy eight dollars and seventy eight cents (\$24,478.78), which sum shall constitute full and final compensation for services rendered, and expenditures [fol. 44] and obligations incurred by the contractor under said contracts.

### Article III

The contractor does hereby for itself, its successors and assignees, remise, release and forever discharge the United States of and from all and all manner of debts, dues, sum or sums of money, accounts, reckonings, claims and demands whatsoever, due or to become due, in law or in equity, under or by reason of, or arising out of said contract No. 5346, and 4683, except a claim which the contractor reserves herewith for depreciation on schooner "Herbert May," which claim has been disapproved by the Claims Board of the Air Service. Upon receipt of the amount herein agreed to be paid, the contractor shall execute and deliver to the United States such further or additional instruments of release as the United States shall demand.

### Article IV

This agreement shall not become a binding and valid obligation of the government unless and until the approval of the Claim Board of the Air Service has been noted at the end of this instrument.

Witnesses, whereof, the parties have caused this instrument to be executed by their respective representatives hereto authorized the day and year first above written.

United States of America, By S. M. Wiley, Captain A. S. A. P. Kunhardt & Company, (Signed) by H. R. Kunhardt, Jr. Witnesses: (Signed) J. P. Power. (Signed) J. H. Power.

Approved, Claims Board, Air Service, May 17, 1919.

(Signed) G. I. Rowley, Jr., Captain A. S. A. P., Recorder.

[fol. 45] VI. DEMURRER TO AMENDED PETITION—Filed May 26, 1923

Defendant demurs to plaintiff's amended petition in this case for the reason that the facts set forth therein do not state a cause of action against the United States.

Robert H. Lovett, Assistant Attorney General. Lisle A. Smith, Attorney.

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VII. ARGUMENT AND SUBMISSION OF DEMURRER

On May 28, 1923, the demurrer to the plaintiff's amended petition was argued by Mr. William F. Norris, for the defendant, and by Mr. Raymond M. Hudson, for the plaintiff.

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IX. ORDER OF COURT SUSTAINING THE DEMURRER AND DISMISSING THE PETITION—Entered June 4, 1923

This cause came on to be heard upon the demurrer of the defendant to the plaintiff's petition as amended. On consideration whereof the court is of opinion that the said demurrer is well taken. It is therefore adjudged and ordered by the court that the defendant's said demurrer be and the same is sustained, and the petition is dismissed.

By the Court.

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X. PROCEEDINGS AFTER ENTRY OF JUDGMENT

On June 21, 1923, the plaintiff filed a motion for a re-hearing. On July 2, 1923, the court overruled said motion.

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[fol. 46] XI. PLAINTIFF'S APPLICATION FOR APPEAL—Filed July 5, 1923

Now comes the plaintiff and moves the Court to allow it an appeal to the Supreme Court of the United States from a judgment of this Court in and on June 4, 1923 to which a new trial was denied July 2, 1923.

Raymond M. Hudson, Attorney for the Plaintiff.

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XII. ORDER OF COURT ALLOWING APPEAL—Entered July 9, 1923

It is ordered by the court that the plaintiff's application for appeal be and the same is allowed.

By the Court.

[fol. 47] COURT OF CLAIMS OF THE UNITED STATES

[Title omitted]

CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above entitled cause; of the argument and submission of case on demurrer of the order of the court dismissing the amended petition; of the plaintiff's application for an appeal; of the order of court allowing appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Seventeenth day of July, A. D. 1923.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of Court of Claims.)

Endorsed on cover: File No. 29,794. Court of Claims. Term No. 484. Kunhardt & Co., Inc., appellant, vs. The United States Filed August 6th, 1923. File No. 29,794.

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